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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARK RUTHRAUFF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0701-CR-6
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE PORTER SUPERIOR COURT  
The Honorable William E. Alexa, Judge  
Cause No. 64D02-0501-FA-431

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**August 8, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Mark Ruthrauff appeals his convictions for class A felony burglary, class B felony criminal confinement, and class C felony battery. We affirm.

## **Issues**

We restate the issues as follows:

- I. Whether the State presented sufficient evidence to sustain Ruthrauff's convictions; and
- II. Whether the trial court committed reversible error when it excluded the deposition of a defense witness.

## **Facts and Procedural History**

The facts most favorable to the jury's verdict indicate that on October 27, 2000, Mickey Ailes was home alone waiting on her husband, Dr. Lonnie Ailes, to come home from work. Ruthrauff and Steven Lynn met at a store in Valparaiso and drove to the Aileses' residence in a white pickup truck. At approximately 6:30 p.m., Mickey Ailes was sitting in her family room watching television when her doorbell rang unexpectedly. A male stated, "[P]izza delivery." Tr. at 374. Ailes responded that they had not ordered any pizza and returned to her family room. A few minutes later, Ailes looked toward her kitchen and saw a man wearing a stocking mask standing in her kitchen. It was later determined that the man in the Aileses' home was Ruthrauff.

Ruthrauff raised a gun and said, "Don't move or I will kill you." *Id.* at 376. Ruthrauff asked Ailes her name. She responded, "Mickey." *Id.* at 378. Ruthrauff stated that she was the doctor's wife and started to name the Aileses' children. When Mickey said that they did not keep money in the house, Ruthrauff said, "[T]hat's okay," and stated that his reason for

being there was a “vendetta.” *Id.* at 379, 382. Ruthrauff hit Mickey’s head several times, knocking her to the ground. Ruthrauff forced Mickey to the front door, where she turned on the light, then he tied her hands and dragged her into the master bedroom. While Ruthrauff was tying Mickey up, Mickey heard her husband Lonnie enter the house shortly before 7:00 p.m. Mickey shouted at Lonnie to get out of the house and call 911. Ruthrauff did not believe that Mickey’s husband was home.

Lonnie went toward the bedroom and saw Ruthrauff holding a chrome semi-automatic handgun. Ruthrauff was about six feet tall, 220 pounds, wearing a blue plaid shirt, blue jeans and a black nylon mask covering his face. Lonnie ran back outside to his truck to call 911 from his cellular phone. He started his truck, but before he could connect his call, the same man Lonnie had seen in his house jumped in the passenger side of the truck and threatened to kill him and hit him. Ruthrauff said, “Lonnie, I’m going to kill you.” *Id.* at 160. Lonnie was able to escape from Ruthrauff and drove to his neighbors to call the police. Meanwhile, Mickey had untied herself and left the residence. Mickey saw a white truck in front of her house. A second man, smaller than Ruthrauff, was running into the truck. This second man was later identified as Steven Lynn. Mickey then ran to several of her neighbors’ houses to get help, but no one was home. Mickey heard somebody blowing a car horn. *Id.* at 391. The police arrived, but Ruthrauff and Lynn had already left the scene. Blood swabs, Lonnie’s cell phone, and the plastic ties used to bind Mickey’s hands were all collected from the scene.

On August 19, 2004, Lynn was arrested during an unrelated home burglary. *Id.* at 192. Lynn told the officers that he had information about the unsolved Ailes burglary, in hopes of reducing his penalty on his current charges. Lynn told the officers that he was not

involved in the Ailes crime and that Ruthrauff and Steve Badanish committed the crime. Lynn gave a second statement to police about the Ailes crime, in which he admitted that he served as a lookout while Ruthrauff and Badanish committed the crime. On January 13, 2005, Lynn gave his third statement to the police with his lawyer present. The police informed Lynn that he was going to be arrested for the crimes at the Aileses' house. Lynn told the police the entire story, including his involvement with the crimes and Ruthrauff's role.

On January 14, 2005, the State charged Ruthrauff with class A felony burglary, class B felony criminal confinement, and class C felony battery. At trial, Lynn admitted to being a liar. Lynn admitted that he lied when he said that he had nothing to do with the Aileses' burglary and when he accused Badanish of helping Ruthrauff commit the crime. Lynn said that he lied to avoid charges or a prison sentence and to protect his girlfriend on a separate burglary charge. On July 19, 2006, a jury found Ruthrauff guilty as charged. Ruthrauff now appeals his convictions.

## **Discussion and Decision**

### ***I. Sufficiency of Evidence***

When reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *Buntin v. State*, 838 N.E.2d 1187, 1189 (Ind. Ct. App. 2005). We will respect "the jury's exclusive province to weigh conflicting evidence and will affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

Ruthrauff asserts that the State did not provide sufficient evidence to support his convictions and that his convictions must be reversed because Lynn's testimony is incredibly dubious. An appellate court may apply the "incredible dubiousity" rule to impinge upon a jury's function to judge the credibility of a witness. *Fajardo v. State*, 859 N.E.2d 1201, 1208 (Ind. 2007). "If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly, uncorroborated testimony of incredible dubiousity." *Id.*

The incredible dubiousity rule does not apply to inconsistent statements made prior to trial. *Newsome v. State*, 686 N.E.2d 868, 875 (Ind. Ct. App. 1997). Also, the rule does not apply in this case because Lynn's statements to the police and his trial testimony were corroborated by Mickey and Lonnie Ailes. Ruthrauff's argument is merely a request to reweigh evidence and judge witness credibility, which we may not do. We conclude that the State presented sufficient evidence to support Ruthrauff's convictions.

## ***II. Exclusion of Deposition***

At trial, Ruthrauff offered into evidence portions of Michael Bruno's deposition testimony. Lynn and Bruno shared a cell at Porter County Jail. At the time of the trial, Bruno was living in Illinois, and his parole officer would not allow him to leave the state to attend the trial, even though he had been subpoenaed. The court excluded Bruno's deposition testimony without explanation. In his deposition, Bruno testified that Lynn had lied about his involvement in the Ailes crimes, and that Lynn had accused Ruthrauff of the crimes to prevent himself from being prosecuted.

“The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition.” Ind. Trial Rule 32(A)(3)(b). “The decision of whether to invoke the rule allowing admission of prior recorded testimony is within the sound discretion of the trial court.” *Williams v. State*, 685 N.E.2d 730, 733 (Ind. Ct. App. 1997). The Sixth Amendment guarantees a defendant in a criminal proceeding the right to present witnesses. *Kellems v. State*, 651 N.E.2d 326, 328 (Ind. Ct. App. 1995). As a fundamental element of due process of law, the defendant has the right to present his own witnesses to establish a defense. *Id.*

As an exception to the hearsay rule, a deposition may be entered by showing that the “declarant is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance by process or other reasonable means.” Ind. Evidence Rule 804(a)(5). Ruthrauff showed that Bruno was unavailable to testify at the hearing and that this was not due to Ruthrauff’s actions. As such, the trial court abused its discretion when it excluded Bruno’s deposition testimony at trial.

“An error in the exclusion of evidence is harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant’s substantial rights.” *Washington v. State*, 840 N.E.2d 873, 885 (Ind. Ct. App. 2006). “Where the wrongfully excluded testimony is merely cumulative of other evidence presented, its exclusion is harmless error.” *Allen v. State*, 787 N.E.2d 473, 479 (Ind. Ct. App. 2003). Bruno’s testimony regarding Lynn’s untruthfulness was merely cumulative of other evidence

introduced at trial. As such, we conclude that the exclusion of Bruno's testimony was harmless. We therefore affirm Ruthrauff's convictions.

Affirmed.

DARDEN, J., and MAY, J., concur.